PUBLIC PROSECUTOR v. RAJAMAH

[F.J. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J., Abdul Hamid F.J. & Hashim Yeop A. Sani J.) July 14, August 2 & 7, 1980]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1980]

Criminal Law and Procedure — Road Traffic — Parking places — Excess charge and surcharge — Whether Ipoh Municipality an appropriate authority — Offences — Refusal to refer question of law to Federal Court — Application to Federal Court — Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order, 1969 — Road Traffic Ordinance, 1958, s. 62 — Courts of Judicature Act, 1964, s. 66.

Road Traffic — Parking places — Excess charge and surcharge.

In this case the respondent had been convicted on her plea of guilty on a charge of failure to pay the excess charge and surcharge incurred in respect of the parking of a motor vehicle, alleged to be an offence under paragraph 13(A)(2) of the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order 1969 and punishable under paragraph 27 of the Order. She was fined $50/- and ordered to pay the charge and surcharge. Acting in revision, Chan J.C. quashed the conviction as he held that the Municipality of Ipoh had not been declared an authority for the purposes of section 62 of the Road Traffic Ordinance, 1958 and therefore had no power to make the order. He also held that the appropriate authority had no power to create offences and provide for their punishment or to create presumptions — See [1980] 1 M.L.J. 241. The Public Prosecutor applied under section 66(1) of the Courts of Judicature Act 1964 for the reference of certain questions of law for the decision of the Federal Court but this application was refused. The Public Prosecutor then applied by way of reference under section 66 of the Courts of Judicature Act and this was heard by the Federal Court.

Held: (1) the Municipal Council of the Municipality of Ipoh is clearly by virtue of *Gazette* Notification P.U. No. 212/1966 an appropriate authority for the purpose of section 62 of the Road Traffic Ordinance 1958;

(2) it therefore has power to provide for the imposition and collection of the excess charge and surcharge and to provide for the presumption in the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order 1969;

(3) offences against any of the provisions of the order are punishable under section 62(7) of the Road Traffic Ordinance, 1958.

Case referred to:-

(1) *Rooney* v. *Snaresbrook Crown Court* [1979] 68 Cr. App. R. 78.

FEDERAL COURT.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the applicant.

Respondent in person.

N. Selvarajah for the Ipoh Municipality.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): Section 62 of the Road Traffic Ordinance, 1958 which reads, in its relevant parts:

"62. (1) Any appropriate authority may by order published in the *Gazette* provide suitable parking places for vehicles ....

(3) An order under subsection (1) may prescribe —

(a) the vehicles or class of vehicles which may use such parking place and the period during which and the conditions subject to which such parking place or stand may be used; and

(b) the charge, if any, to be made for the use of such parking place.

(4) Where any charge for the use of such parking place is to be made or intended to be made pursuant to any order under this section, such order shall specify —

(i) ....

(ii) ....

and may further make provision in a parking place for any of the matters following:

....

(f) the charges to be levied in respect of the use thereof and the manner of its collection;"

provides for the creation of parking places and for the imposition of charges for the use thereof. The former is a necessary convenience in a civilization so completely dependent on personal motorised transport and the latter is the means to exact payment, at least, in part for the provision and for the maintenance of the parking places from those who use the amenities. This duty of providing and charging for such services is placed on the "appropriate authority."

Now the appropriate authority for and within the Municipality of Ipoh is by the interpretation in section 58 of the Road Traffic Ordinance, 1958 in relation to any road situate within the area of the Municipality the Municipality but only if it is declared by the Minister charged with responsibility for Local Government, to be such an authority.

Claiming to be such an authority, the Ipoh Municipality made an order known as the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order, 1969 which in effect creates parking places, regulates their use and fixes the charges for such user. This order also provides for the imposition under certain circumstances of excess charge or surcharge and if this is not paid within the time fixed, the imposition of an increased excess charge or surcharge as the case may be. This order, in the usual form of orders, does not refer to any declaration made by the responsible Minister of the appointment of the Ipoh Municipality as an appropriate authority but merely states that the Ipoh Municipality is such an authority.

If the Ipoh Municipality is in fact an appropriate authority, then it is clear that the Order is unchallengeable save on the ground of the reasonableness of the charges.

For nigh on ten years, this order has been acted on without challenge to its legality or to the quanta of the charges. Parking places have been provided, fees collected and where these have not been paid, excess charges or surcharges and in appropriate cases increased excess charges or surcharges have been imposed and collected. Everyone, or almost everyone, has hitherto accepted the validity and reasonableness of this order without demur. But in Perak Criminal Revision No. 11 of 1979, Mr. N.H. Chan, Judicial Commissioner (as he then was), *suo motu*, read that order as if by it, the Ipoh Municipality had declared itself to be the appropriate authority and he came to the opinion that it was a wrong declaration, since only the relevant Minister could so declare it. The Order was therefore, in his view, made without authority. Accordingly, he called up on revision the case of a car owner who had pleaded guilty to a charge of failing to pay an excess charge for parking, thereby rendering herself liable to an increased excess charge under paragraph 13A(2) of that Order, set aside

the conviction and ordered the fine imposed and the charge, if paid, to be refunded. The basic contention of the lengthy oral judgment ([1980] 1 M.L.J. 241) which he delivered was that there had been no such declaration by the Minister in charge of Local Government. But surely that is a matter to be looked for, not in the Order itself if he felt any doubt as to the correctness of the preamble to the Order but in the Government *Gazette*. Regretfully he did not look there.

It is not clear from the record, whether at this revision the learned Judicial Commissioner sought the advice of the Deputy Public Prosecutor who was present whether the responsible Minister had in fact declared the Ipoh Municipality to be such an appropriate authority. If he had, the learned Deputy Public Prosecutor would have wrongly advised him. If he had not, then he had perhaps not done justice to himself, apart from the question of justice to others. In such an obscure matter as an appointment by the responsible Minister, it is not generally an easy matter to discover the relevant notification since this notification is usually published under a legal notification in the Government *Gazette* and there is no index of such notifications for easy reference. One would have thought therefore that before he decided to act on the matter, he would have sought confirmation from the one person or body who would know — the Ipoh Municipality itself. It is within his powers to call for the attendance of the officer from the Municipality who prosecuted the offence or of any responsible officer in the know. Had the learned Judicial Commissioner done so, if necessary, postponing the revision, he would have been advised that the then Minister in charge of Local Government had in fact declared the Ipoh Municipality to be such an appropriate authority, he would have been shown the relevant Government *Gazette* and he would have avoided an unnecessary and wrongful revision and its unfortunate ramifications in the form of contempt proceedings taken by and before himself in complete disregard of the decision in *Rooney* v. *Snarebrook Crown Court*[1] against a high officer of the Municipal Council who was only too aware the Council had the necessary authority and who did not consequently consider he should abdicate from his duties or feel himself bound by a decision that was clearly *per incuriam* and wholly wrong. And this court would have been spared this reference and the somewhat lengthy process by which this reference has reached us.

We now set out the *Gazette* Notification P.U. No. 212 of 1966:

"P.U. 212.

ROAD TRAFFIC ORDINANCE, 1958
Declaration under Section 58

In exercise of the powers conferred by section 58 of the Road Traffic Ordinance, 1958, the Minister charged with the responsibility for local government, after consultation with the State Government of Perak, hereby declares with effect from December 21, 1964, the Municipality of Ipoh to be an appropriate authority in relation to any road situate within the area of the said Municipality.

Dated this 4th day of May, 1966.

[KKTP(FC) 7036 Vol. II: AG. 1875/1]

Sgd. KHAW KAI-BOH,
Minister for Local Government & Housing."

While the learned Judicial Commissioner was right in refusing to accept the preamble in the Order as correct, he was bound to take judicial notice of this *Gazette* Notification.

This declaration which in effect is the effective appointment of the Ipoh Municipality as the appropriate authority for the purposes of section 62 of the Road Traffic Ordinance and which provides it with the necessary powers to make the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order, 1969 must falsify the reasoning in the judgment of the learned Judicial Commissioner which is predicated on the one idea that the Ipoh Municipality is not such an authority.

Clearly therefore, the answers to the following questions which had been put before us on reference under section 66(1) of the Courts of Judicature Act, 1964, against the wishes of the learned Judicial Commissioner:

1. Is the Municipal Council of the Municipality of Ipoh an "appropriate authority" for the purpose of section 62 of the Road Traffic Ordinance, 1958?
2. If so, has it the power under section 62 of the Road Traffic Ordinance, 1958 to make an Order providing for the following —
   (a) The imposition and collection of the "excess charge" and "surcharge" as provided for under paragraphs 13(A)(1) and 13(A)(2) respectively of the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order 1969;
   (b) The presumption appearing in paragraphs 13A(3) and 24 of the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order, 1969;

are in the affirmative: see sections 62 and 138 Road Traffic Ordinance.

The answer to question (c) which is in these words:

(c) The creation of the offence and the punishment in respect thereof as provided in paragraph 27 of the Road Traffic (Attendant Parking Places) (Ipoh Municipal Council) Order, 1969

must clearly be in the negative. Under section 62 Road Traffic Ordinance, 1958, the Minister appoints the appropriate authority and empowers it thereby to create and provide for parking places and stands, to prescribe and to charge for the user thereof. Nowhere does it enable the Minister to delegate to the appropriate authority any power to create an offence and to provide the punishment for such an offence. Nonetheless, there is a provision to punish an offence against any of the provisions of this Order made by the Municipality of Ipoh under its powers as the duly appointed appropriate authority: see section 62(7) Road Traffic Ordinance, which provides

"62. (7) If any person without lawful excuse contravenes or fails to comply with an order made under this section, he shall be guilty of an offence and shall be liable to a fine not exceeding one hundred dollars."

Order accordingly.

Solicitors: *Lewis & Co.*